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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL DE LA CONCEPCION,

Petitioner,

v.

PUERTO RICO LABOR
RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

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QUESTION PRESENTED

May the Labor Relations Board of the Commonwealth of Puerto Rico assume jurisdiction over the conduct of an employer with respect to employees whose employment ceased during a strike, in an area of labor relations preempted by federal law.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico in case 0-79-470 of said Court.

OPINIONS BELOW

The opinion of the Supreme Court of the Commonwealth of Puerto Rico appears in the Spanish language in 83 J.T.S. 63 and in 83-CA-57. A translation certified by the Clerk of said court is fully reproduced in the appendix to this petition and will be identified, infra.

The Decision and Order of the Puerto Rico Labor Relations Board has not been published. A translation of the

pertinent findings of facts, the conclusions of law and the Cease and desist Order is reproduced in the Appendix, infra.[1]

JURISDICTION

On June 14, 1983, the Supreme Court of the Commonwealth of Puerto Rico[2] determined that the Puerto Rico Labor Relations Board[3] has jurisdiction to compel petitioner to comply with the provisions of the Puerto Rico Labor Relations Act and to adjudicate pursuant to said statute the employment rights of strikers whose employment had terminated in 1973. A rehearing was ultimately denied on August 11, 1983. As the decision touches rights, privileges and inmunities arising under a federal statute, jurisdiction of this Court is invoked under 28 U.S.C. 1258.

STATUTES

The pertinent provisions of the statutes involved are as follows:

1. The Judicial Code (28 U.S.C. 1258(3)):

> "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

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[1] For the purpose of conciseness the irrelevant findings of facts have been deleted. All the portions of the Decision and Order of the Puerto Rico Labor Relations Board to which reference is made in the text of this petition have been certified in an official translation.

[2] Hereinafter referred to as "the Supreme Court of Puerto Rico" or as "the Commonwealth Supreme Court."

[3] Hereinafter referred to as "the Local Board" or "the Puerto Rico Labor Board."

(1) * * *

(2) * * *

(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States."

2. The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.):

Section 7—Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities . . .

Section 8(a)—It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this title;

. . .

(3) By discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization

. . .

. . .

(5) To refuse to bargain collectively with the representatives of his employees . . .

Section 10(a)—The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power

shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

3. The Puerto Rico Labor Relations Act; Law No. 130, May 8, 1945, as amended (29 L.P.R.A. 65-69):

Section 4—Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8—(1) It shall be an unfair labor practice for an employer acting individually or in concert with others:

(a) To interfere with, restrain or exercise coercion upon, or to attempt to interfere with, restrain or exercise coercion upon his employees in the exercise of the rights guaranteed in section 4 of this title.

(b) . . .

(c) To encourage, discourage or attempt to encourage or discourage membership in any labor organization by discrimination in regard to hiring, firing, or in connection with the tenure or other terms or conditions of employment . . .

(d) To refuse to bargain collectively with the representative of a majority of his employees in a unit appropriate for collective bargaining . . .

STATEMENT OF THE CASE

In 1973 a labor organization called Federacion de Enfermeras Practicas Licenciadas de Puerto Rico[4] seeking to organize the licensed practical nurses of Hospital de la Concepcion,[5] filed representation proceedings before the Regional Director in Puerto Rico of the National Labor Relations Board.[6] A consent election was held and the union was certified as the bargaining agent of the nurses.

A few months thereafter the Regional Director of NLRB set aside the certification by reason of the fact that as a non profit institution the Hospital was exempt from the Act. Following the decertification and to protest the discharge of an employee the union went on a strike. (App. A, 2a).

On October 23, 1973 the union requested the Puerto Rico Labor Relations Board that charges be filed against the Hospital under the Puerto Rico Labor Relations Act.[7] An examiner of the Local Board refused, stating that it would not be worthwhile to press charges, and advised the union to go on with the strike because that was the best way to put pressure on the employer. (App. A, 2a).

The union then filed a complaint in the Superior Court of Puerto Rico against the Hospital, the National Labor Relations Board and the Puerto Rico Labor Relations Board. It sought a decree setting aside the decertification order issued by NLRB, ordering the Local Board to process the unfair labor practice charges and enjoining

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[4] Hereinafter referred to as "the union."

[5] Hereinafter referred to as "the Hospital" or as "petitioner."

[6] Hereinafter referred to as "NLRB" or as "the Federal Board."

[7] Hereinafter referred to as "the local statute" or "the local law."

the Hospital from refusing to recognize the union. It also asked for damages in behalf of the employees. On December 7, 1973 the Superior Court dismissed the injunction.[8] (App. A, 3a).

On January 9, 1974 the union reproduced the unfair labor practice charges before the Local Board, invoking the provisions of the Puerto Rico Labor Relations Act. On that occasion the charges were filed. (App. A, 3a).

On August 25, 1974, while the Local Board was investigating the charges, Public Law 93-360,[9] bringing voluntary hospitals under the cover of the National Labor Relations Act, went into effect. Rather than filing new charges with the Federal Board under the amended Federal Act, the union chose to go on with the charges in the Local Board.

On March 3, 1975, the Local Board ordered the filing of a complaint, case CA-5054, charging the Hospital with the commission of several unfair labor practices under the provisions of Sections 8(1)(a), (c) and (d) of the Puerto Rico Labor Relations Act. (App. C, 15a). Petitioner denied the allegations of the complaint and, among other special defenses, raised the lack of jurisdiction of the Local Board to adjudicate a controversy in a field of labor relations preempted by federal law. (App. C, 22a).[10]

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[8] However, the Superior Court did not pass on the claim for damages until August 20, 1976, when it dismissed the cause. App. C, 3a.

[9] 88 Stat. 395, 29 U.S.C.A., Sec. 152(2). Hereinafter referred to as "the amendments" or "the amendments to the Act."

[10] After the filing of the complaint before the Local Board, NLRB asserted jurisdiction over petitioner in case 24-RC-5611. App. C, 19a. Thus, the jurisdiction of NLRB is not in question.

The Local Board, nevertheless, persisted in its assertion of jurisdiction and, after a hearing, issued on November 28, 1978 a Decision and Order dismissing petitioner's defense of lack of jurisdiction. It held that since the amendments to the Federal Act did not have a retroactive effect and the discharge of the affected employees had occurred prior to the amendments, the National Labor Relations Board was precluded from asserting jurisdiction over the controversy. (App. C, 23a). It also held, on the basis of an advisory opinion of NLRB related to another hospital, [11] that the National Labor Board had ceded its jurisdiction over all controversies involving non profit hospitals related to events which occurred prior to August 25, 1974. It further held that the present controversy was subject to the local law.

The Local Board concluded that petitioner had violated the Puerto Rico Labor Relations Act by refusing to bargain with the union and by refusing to reemploy the strikers. It held that since the National Labor Relations Board as of August 25, 1974 had assumed jurisdiction over voluntary hospitals, it would not provide remedial action with reference to the hospital's refusal to bargain, in order to avoid conflict with the National Board (App. C, 25a). However, it ordered petitioner to cease and desist from violating the Puerto Rico Labor Relations Act, to reemploy five strikers and to pay them wages, from the time they ceased to work until such time as reemployed, and to post a notice of compliance with the provisions of the Puerto Rico Labor Relations Act. (App. C, 25a).

On October 9, 1979, the Local Board filed a petition requesting that the Supreme Court of the Common-

[11] Puerto Rico Labor Relations Board and Hospital Auxilio Mutuo, 217 NLRB 1592 (1975).

wealth of Puerto Rico enforce the cease and desist order; case 79-470. The Hospital opposed assigning as error, among others, the assertion of jurisdiction of the Local Board in an area preempted by Federal Law. (App. A, 1a). On June 14, 1983, the Commonwealth Supreme Court issued a decision dismissing the hospital's assignment of errors. (App. A) On the specific issue of preemption it adhered to the views of the Local Board and held that since the employees had been dismissed prior to the effective date of the amendments, the National Labor Relations Board did not have jurisdiction over the subject matter. It further held that the remedy ordered by the Local Board was in accord with the policies of NLRB and, therefore, there was no preemption; (App. A, 7a). It proceeded to adjudge that the cease and desist order of the Local Board be put into effect. (App. A, 11a). Subsequent petitions for reconsideration were ultimately denied on August 11, 1983. (App. B.)

As a result, the Hospital has no recourse other than to petition this Court for a Writ of Certiorari to review the holding of Commonwealth Court on the question of federal preemption.

REASONS FOR GRANTING THE WRIT

1. Under the doctrine of federal preemption, the states may not regulate activity that is either arguably protected by Section 7 or arguably prohibited by Section 8 of the National Labor Relations Act.[12] As stated by this Court:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations

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[12] Hereinafter referred to as "the Federal Act" or "the Act."

> Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

San Diego Building Trades Council v. *Garmon*, 359 U.S. 263 (1959) at 244.

We submit that every aspect of the conduct of the petitioner and every claim against it concerns activities which as of August 25, 1974, and ever since thereafter, have been either protected or prohibited by the Federal Act. The attempt of the Local Board to subject such activities to the provisions of the local law is an invasion of the exclusive jurisdiction of the National Labor Relations Board and an impermissible disregard to the doctrine of federal preemption that emanates from a significant assemblage of decisions of this Court; among others: *Bethlehem Steel Corp.* v. *New York Labor Board*, 330 U.S. 767 (1947); *Garner* v. *Teamsters Chauffers and Helpers*, 346 U.S. 485 (1953); *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) *supra*, and *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). The decision is contrary to the holdings of the Court of Appeals for the Second Circuit in *NLRB* v. *St. Luke's Hospital Center*, 551 F.2d 476 (1976) and in *NLRB* v. *Committee of Interns*, 566 F.2d 810 (1977), *cert. denied* 435 U.S. 904 (1978). The decision departs from the views expressed by the National Labor Relations Board in Cedars Sinai Medical Center, 223 NLRB 251, 91 LRRM 1398 (1976) and in Kansas City General Hospital, 225 NLRB 108, 93 LRRM 1362 (1976) and is premised on a misconception of the advisory opinions of NLRB in Van-

couver Memorial Hospital, 219 NLRB 73, 89 LRRM 1592 (1975) and Puerto Rico Labor Relations Board and Hospital Auxilio Mutuo, 217 NLRB 992 (1975), 89 LRRM 1164.

In its opinion the Commonwealth Supreme Court recognizes that the Puerto Rico Labor Relations Board has no power over matters under the jurisdiction of NLRB.[13] However, in holding the doctrine of preemption inapplicable, it decides that the fact that the proceedings in the Local Board from the filing of the complaint to the cease and desist order took place after the effective date of the amendments is of no import since jurisdiction must be determined on the basis of the date on which the dismissal of the employees took place. It further holds that no cession of jurisdiction by NLRB to the Local Board is necessary because NLRB does not have jurisdiction over the controversy.

To sustain its decision, the Commonwealth Supreme Court relies on the Guidelines issued by the General Counsel of the National Labor Relations Board for use of Board Regional Offices in Unfair Labor Practice Cases Arising Under the 1974 Non Profit Hospital amendments to the Taft-Hartley Act, memorandum no. 74-79 of August 20, 1974, 86 LRR 389.[14] In said memorandum the General Counsel indicated that where charges filed after the effective date of the law were based upon conduct occurring entirely before the effective date of the law, it would appear that such cases would be dismissed as no party can be deemed to violate a law before it becomes effective.

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[13] *Cf. Asoc. de Empleados de Bayamon Transit* v. *Labor Relations Board*, 70 P.R.R. 243 (1949).

[14] Yearbook of Labor Relations, 1974 Ed. BNA, pages 343 to 365.

We submit that contrary to the interpretation that the Commonwealth Court gives to that memorandum, the same does not waive preemption. The position taken by the General Counsel is in harmony with the rule that a statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage. The statement quoted by the Commonwealth Supreme Court is not in conflict with the doctrine of preemption. To the contrary, the memorandum reflects that the amendments preempted the field. As stated by the General Counsel:

> "F. Preemption
>
> Just as the National Labor Relations Act itself has been consistently viewed as preempting existing state laws, so, too, will state labor relations laws concerning health care institutions now covered by the Act be preempted. Congress was aware of this and fully realized that state legislation would have to yield to a paramount and uniform federal policy."

Yearbook of Labor Relations, BNA, 1974 Ed., at 359.

Also, footnoted to that statement is a reference to 119 Cong. Rec. 9,599 where it is indicated that an amendment offered by Rep. Quie, to insulate state laws such as Minnesota's from preemption, was defeated by the House.[15]

The statement of the General Counsel is nothing more than an expression of an administrative policy, for the use of his office. The federal regulation of labor law is so sweeping that it is inconceivable that the power of the Commonwealth of Puerto Rico to assume jurisdiction over the present controversy could turn on the way in which a functionary of NLRB decides a policy question.

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[15] *Id.*, at page 359.

Cf. N.L.R.B. v. *Committee of Interns*, 566 F.2d 810 (1977), at 814.

The Commonwealth Supreme Court also relies on a statement of Congressman Thompson, in reply to Congressman Quie, reported in 120 Cong. Rec. 6,392-93 (July 11, 1974) that there was no provision in the federal law prohibiting the states to finish their proceedings where charges under state law had been filed prior to the effective date of the amendments.

That statement restates the traditional problem that pervades repeal legislation. As a rule, the presumption against retroactivity is designed to protect reasonable reliance on prior settled law while permitting the new law full prospective effect. *NLRB* v. *St. Luke's Hospital Center*, *supra*. Obviously, Congressman Thompson had in mind that unfair labor practice proceedings under state law which had reached a terminal status should not be unsettled by the amendments; *Cf. National Labor Relations Board* v. *National Garment Co.*, 166 F.2d 233 (8th Cir. 1948), *cert. denied*, 344 U.S. 845, 1948). But he could not have envisioned continuing post amendment jurisdiction of state agencies to issue complaints, hold hearings and adjudicate controversies over transgressions which occurred prior to the amendments, because that would be tantamount to concurrent state and federal jurisdiction and such duality of jurisdiction is contrary to preemption. *Bethlehem Steel Co.* v. *N.Y. Labor Relations Board*, *supra*.

The Commonwealth Supreme Court also relies on two advisory opinions of NLRB to sustain its assumption of jurisdiction: Vancouver Memorial Hospital, 219 NLRB 73, 89 LRRM 1592 (1975) and Puerto Rico Labor Relations Board and Sociedad Espanola de Auxilio Mutuo, 217 NLRB 992, 89 LRRM 1164 (1975). It is submitted that to

the contrary, both opinions sustain the preemptive effect of the amendments.

In Puerto Rico Labor Board and Sociedad Espanola de Auxilio Mutuo NLRB, at the joint request of the parties therein involved, advised that, based on the employer's dollar volume of business, it would assert jurisdiction over that hospital, although limited to unfair labor practices which occurred on or after August 25, 1974. The Commonwealth Supreme Court takes that statement as an indication that NLRB lacks jurisdiction over every activity related to pre-amendment conduct. That view is ill-grounded.

The statement of NLRB in Auxilio Mutuo about pre-amendment transgressions is in consonance with the rule that a statute may not be given a retroactive construction unless specifically so ordered by the legislature. *NLRB* v. *St. Luke Memorial Hospital, supra.* NLRB's unequivocal statement that it would exercise jurisdiction over the hospital as of August 25, 1974 proclaims preemption and forecloses continuing jurisdiction of the local board over the controversy. The lack of retroactivity of the amendments is relevant only to the issue of the applicability of the federal act to pre-amendment conduct. It has no cognation to local jurisdiction because once the area is occupied by the Federal Act, the lack of local jurisdiction is a foregone conclusion. *San Diego Building Trades Council* v. *Garmon, supra.*

The advisory opinion of NLRB in *Vancouver Memorial Hospital, supra,* which is subsequent to Auxilio Mutuo, reiterated the preemptive effect of the amendments.

Vancouver involves a hospital that prior to the amendments granted its employees unilateral wage increases even though they were represented by a labor organiza-

tion and a collective bargaining agreement was in effect. Based on that conduct, when the amendments to the federal act went into effect, unfair labor practice charges were filed under the Federal Law before the National Labor Relations Board. The Regional Director of NLRB dismissed them on account of the fact that the increases had been granted before the amendments. When the union filed a claim in the Superior Court of Washington for discriminatory wage increases under a state statute, the employer requested an advisory opinion from NLRB on the issue of jurisdiction. The union opposed alleging that the Regional Director's refusal to file the charges had settled the question of jurisdiction.

In its advisory opinion NLRB held that at the time of the increases it had no subject matter jurisdiction over the hospital and therefore, the Regional Director had correctly dismissed the charges. However, it held that the Regional Director's action did not settle the underlying issue of the jurisdiction of the Federal Board over the employer on or subsequent to the effective date of the amendments, (219 NLRB 73). On the basis of the economic data submitted NLRB concluded that the hospital fell within its jurisdiction.

In view of such a lucid expression about the preemptive effect of the amendments, and in the light of subsequent holdings of NLRB: Cedars-Sinai Medical Center, 223 NLRB 251 (1976) and Kansas City General Hospital, 225 NLRB 108 (1976) there is no doubt that the Puerto Rico Labor Board has gone beyond its power in assuming jurisdiction over the controversy in the instance case.

2. The Commonwealth Supreme Court premises its assertion of jurisdiction on the decisions of *Woodlawn Memorial Hospital* v. *NLRB*, 596 F.2d 1330, 7th Cir. (1979) and *Methodist Hospital of Ky., Inc.* v. *NLRB*, 619

F.2d 563, 6th Cir. (1980). The facts in both cases belie that conclusion.

In Woodlawn NLRB ordered a hospital to reinstate certain strikers that had been discharged prior to the amendments. In reversing as to some of the strikers, the Court of Appeals reasoned that the term "employee," as structured in Section 2(3) of the Federal Act, does not include persons who are discharged while engaged in unprotected activities. It held that Woodlawn's employees, by striking prior to the effective date of the amendments, engaged in conduct which Congress had declined to protect. It went on to find that, absent a clear showing that Congress had intended the amendments to be retroactive, the employer was not obligated to reinstate the strikers.

It further held that those strikers who had not been discharged prior to the amendments were still employees and the employer was required to reinstate them unless it could prove that they had engaged in misconduct that justified a refusal to take them back.

Methodist Hospital also deals with pre-amendment strikers. There the Sixth Circuit follows the doctrine of Woodlawn. In addition, it holds that absent proof of specific individual misconduct, the refusal to hire pre-amendment strikers as new employees would violate Sections 8(a)(1) and 8(a)(3) of the Federal Act.

Apparently the statement of the Court in Woodlawn and Methodist Hospital stressing that the amendments may not be applied retroactively has led the Commonwealth Supreme Court to conclude that NLRB has no jurisdiction over labor controversies, such as the one in the instance case, which relate to pre-amendment conduct. Such view is erroneous. In Woodlawn and Methodist Hospital retroactivity of the amendments correlated

solely to the employment status of the strikers. That NLRB had jurisdiction over the controversy raised by those pre-amendment strikers is a conclusion that derives inevitably from the fact that it adjudicated their rights and sought and obtained their enforcement. The statement of the Commonwealth Supreme Court in the instance case to the effect that the two decisions reflect the lack of jurisdiction of NLRB over the subject matter of the present controversy defies all logic.

Woodlawn and Methodist Hospital preface the present controversy. Under their doctrines, whatever rights the strikers in the instance case may have, involve a threshold determination by NLRB as to whether they were effectively discharged prior to the amendments and as to whether petitioner, after the amendments, has denied them employment on account of their having participated in the strike. How can the local board be now empowered to decide, applying local law, whether or not they are employees? Moreover, if in effect the strikers in the instance case were discharged prior to the amendments, they have lost their status as employees and NLRB is precluded from ordering their reinstatement. How can the Local Board be empowered to order petitioner to reemploy them? If this is allowed, the Local Board will be granting a remedy, in a preempted area, which has been withheld by Congress from NLRB—an incongrous result which is possible only if the entire doctrine of preemption is thrown overboard.

3. The Commonwealth Supreme Court emphasizes that there is no preemption since the remedy that the Local Board has decreed in the instance case is parallel to the remedy that would follow under the Federal Act. That view has been repeatedly rejected by this Court: The power to decide a matter can hardly be made dependent on the way it is decided, *Bethlehem Steel Co.* v. *New*

York Labor Relations Board, supra; remedies form an ingredient of the integrated scheme of regulation sought by Congress in enacting the National Labor Relations Act, *San Diego Building Trades Council* v. *Garmon, supra;* preemption seeks avoidance of conflict in its broadest sense and extends to the process for effectuating the National Labor Policy, *Motor Coach Employees* v. *Lockridge, supra.* Even where NLRB declines to exercise its jurisdiction over a labor dispute affecting commerce, a parallel remedy before a state board is nonetheless preempted, *Guss* v. *Utah Labor Board, supra.*

It is axiomatic that when the federal law preempts the field of labor relations, the National Labor Relations Board may exercise control over all labor management relations in the industry. *Bethlehem Steel Corp.* v. *NLRB*, 330 U.S. 767 (1947), *supra.* When that happens, the local courts and agencies may apply their jurisdiction: (a) if NLRB executes a valid cession of jurisdiction under Sec. 10(a) of the Act; or (b) if the Federal Board feels that a particular controversy does not have sufficient impact over interstate commerce and refuses to assert jurisdiction pursuant to Section 14(c) of the Federal Act. Local jurisdiction is also allowed in matters involving great local feeling and concern and where the conduct of the parties is merely of a peripheral concern to NLRB. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966).

In the instance case there has been no cession of jurisdiction under Section 10(c) of the Act.[16] NLRB has

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[16] The fact that in the instance case the Local Board took 14 months to investigate the charges features one of the many differences in administrative techniques between the two boards that preclude any possibility of cession of jurisdiction.

asserted jurisdiction over the petitioner. Therefore, the provisions of the Sec. 14(c) of the Act are not applicable and the rationale for allowing limited state intrusion into a preempted area, in matters of local concern, is not present. It is submitted that every claim asserted against the hospital relates to activities which are either arguably prohibited or arguably protected by the Federal Act and thus of primary concern to NLRB.

4. It is further submitted that if there is any doubt as to whether the conduct in question is governed by the federal law, the Local Board and the Commonwealth Courts must yield initial determination of the issue of federal jurisdiction to NLRB. As expressed by this Court:

> "It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board."

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959), supra, at 244-245.

It is well settled that when a high court of a state enters a final order confering jurisdiction over a state court or a state administrative agency over an issue alleged to be preempted by NLRB, then the jurisdictional question is ripe for review by this Court and should be heard before further proceedings are allowed to take place at the state level—*Local No. 438, Construction and General Laborer's Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963).

Certiorari should be granted primarily to determine whether the decision of the Commonwealth Supreme Court is in conflict with the preemption doctrine. On a

more fundamental level, it should be granted in order for this Court to determine whether the lack of retroactivity of an amendment to the National Labor Relations Act entitles local agencies and local courts to continue asserting jurisdiction over labor disputes which originate before the effective date of such amendment.

CONCLUSION

On the basis of the foregoing argument and upon the authorities herein cited the petitioner submits that its petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

No. 0-79-470

PUERTO RICO LABOR RELATIONS BOARD,
Petitioner,

v.

HOSPITAL DE LA CONCEPCION,
Respondent.

Review

MR. JUSTICE TORRES RIGUAL delivered the opinion of the Court.

(Translation)

San Juan, Puerto Rico, June 14, 1983

The Labor Relations Board asks us to enforce a decision and order issued against Hospital de la Concepcion, whereby the latter is ordered to cease and desist from dismissing its employees or changing their working conditions because of their participation in union activities; from restricting or coercing the hospital employees from exercising their rights; and to reinstate five employees to their former positions or to positions similar to those they held, plus back pay and the corresponding deductions. The Hospital has raised objection to the Board's petition, and has assigned the following errors: 1) determining that the Hospital refused to bargain in good faith with the Federation; 2) deciding that the employees were dismissed in violation of the law; 3) dismissing the defense of equitable estoppel; 4) dismissing the defenses of res judicata and of collateral estoppel by judgment with regard to case No. CS-73-4473 filed by the Federation before the Superior Court; 5) concluding that it has jurisdiction over the controversy.

Let us first make a brief relation of the facts that gave rise to these assignments, and we shall then pass on their validity.

On or about 1973, the Federacion de Enfermeras Practicas Licenciadas de Puerto Rico (Puerto Rican Nurses Federation) and the Hospital de la Concepcion executed an Agreement for Elections by Consent. After the election was held, the Regional Director of the National Labor Relations Board, on March 9 of that year, certified the Federation as the exclusive representative, for collective bargaining purposes, of licensed nurses and of those with a temporary license. A few months later, on August 23, the National Labor Relations Board set aside this certification on the ground that nonprofit hospitals were excluded from the scope of the federal act. 29 U.S.C.A. § 152(2) (1973).

After the election was held and the certification was issued on March 9, the relations between the Hospital and the nurses began to deteriorate. During the period between March and October 1973, the Hospital put an end to the snack given, as part of the working conditions, to the nurses on the 11:00 p.m. to 7:00 a.m. shift; the Hospital prohibited special shifts worked by some nurses as a direct service to patients; and ordered some of the practical nurses to move out of the bedrooms that they occupied in the Hospital.

As a result of these actions and in view of the Hospital's refusal to recognize the Federation, the nurses called a work stoppage, the immediate cause of which was, however, the dismissal of nurse Nancy Vega. On October 23, the nurses appeared before a Board Examiner with the purpose of filing a charge for unfair labor practice. The examiner told them that the matter was not worth the trouble, and advised them to go ahead with the stoppage because this was the best way to put pressure on them. The Federation decided then to file a complaint with the Superior Court against the Hospital praying that the National Board's decertification be set aside, that the L.R.B. be ordered to investigate the unfair labor practice charges, that an injunction against the Hospital be issued to force it to bargain, and that a compensation for damages be paid. On December 7, 1973, the court, upon correctly concluding that this was a classical labor-management dispute, de-

cleared that it had no jurisdiction. This notwithstanding, it was not until August 20, 1976 that the court dismissed the complaint pursuant to Rule 11 of the Rules for the Administration of the Courts of First Instance.

Nonetheless, on March 9, 1974, the Federation filed before the petitioner Labor Relations Board an unfair labor practice charge against the Hospital, and, on that occasion, the grievance that gave rise to the Decision and Order object of this appeal was issued.

JURISDICTION OF THE BOARD

We will consider first the fifth assignment regarding the jurisdiction of the Labor Relations Board, because the consideration of the other assignments depends on the solution of this point.

The 1935 National Labor Relations Act, known as the Wagner Act, included nonprofit hospitals within its scope, 49 Stat. 449 (1935). Later on, in 1947, the Taft-Hartley Act expressly excluded nonprofit hospitals from the definition of "employer," and, hence, rendered the federal statute inapplicable. 61 Stat. 136 (1947), 29 U.S.C.A. § 152(2) (1973). When Hospital de la Concepcion became aware of this exclusion, it applied for a decertification which it obtained from the National Labor Relations Board on August 23, 1973. A year later, on July 26, 1974, the scope of the federal act was again extended to nonprofit hospitals when the exception established in the Taft-Hartley Act was eliminated. Public Law No. 93-360, 88 Stat. 395, 29 U.S.C.A. § 152(2) (1980 Supplement). Hence, the National Board presently has jurisdiction over nonprofit hospitals as far as federally regulated activities are concerned.[1]

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[1] For a discussion of the legislative and judicial history of the 1974 amendments, see: Fehely, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 Ohio S.L.J. 235 (1975); Vernon, *Labor Relations in the Health Care Field Under 1974 Amend-*

We must decide whether the inclusion of nonprofit hospitals within the scope of the federal act bars petitioner from assuming jurisdiction over unfair labor practices committed before the federal act took effect on August 25, 1974.

The Labor Relations Board has no authority to intervene in matters within the jurisdiction of the National Board. *Rivera* v. *Security Nat. Life Ins. Co.*, 106 D.P.R. 517 (1977); *Puerto Rico Telephone Co.* v. *Labor Relations Board*, 86 P.R.R. 362 (1962); *Asoc. Empl. Bayamon Transit* v. *Labor Relations Board*, 70 P.R.R. 273 (1949). There is no jurisdictional conflict, however, when the Labor Relations Board regulates activities not covered by the federal statute or unfair labor practices not included in said statute. *Puerto Rico Telephone Co.* v. *Labor Relations Board, supra.* In *Asoc. Empl. Bayamon Transit, supra*, we specifically held that the Board has jurisdiction when the employer's business is exempt from the federal act but subject to the Puerto Rican statute. Nonprofit organizations have always been subject to our Labor Relations Act. Consequently, before August 25, 1974, date when nonprofit hospitals were included in the federal statute, petitioner had jurisdiction over the labor disputes in said institutions. See: *Labor Relations Board* v. *Milares Realty, Inc.*, 90 P.R.R. 821 (1964); *Labor Relations Board* v. *Club Deportivo*, 84 P.R.R. 495, 501 (1962); *Asoc. Hospital del Maestro y Federacion de Enfermeria Practica Licenciada de Puerto Rico*, Case No. PP-112, P-3079, D-656 (1973). This notwithstanding, we must determine whether the August 25, 1974 amendment to the federal statute has a retroactive effect, in which case the petitioner could not assume jurisdiction over labor disputes that arose before said date.

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ments to the National Labor Relations Act An Overview and Analysis, 70 Nw. U.L. Rev. 202 (1975); Shepard, *Health Care Institution Amendments to the National Labor Relations Act: An Analysis*, 1 Am. J. L. & Med. 41 (1975); Comment, *National Labor Relations Act—History and Interpretation of the Health Care Amendments*, 60 Marq. L. Rev. 921 (1977).

The problem of the retroactivity of the amendment that included nonprofit hospitals in the federal statute was foreseen by the General Counsel of the National Labor Relations Board in a Memorandum of August 20, 1974, wherein he said:

> A further example of a transitional problem that may arise is an unfair labor practice charge filed [with the National Labor Relations Board] after the effective date of the law, based upon conduct occurring entirely before the effective date of the law. It would appear, in light of past experience with cases arising under the extension of jurisdiction over the U.S. Postal Service [*U.S. Postal Service*, 200 N.L.R.B. No. 56, 81 L.R.R.M. 1533 (1972)] that such cases would be dismissed, *as no party can be deemed to have violated a law before that law becomes effective.* (Underscore supplied.) Guidelines Issued by the General Counsel of the National Labor Relations Board for Use of Board Regional Offices in Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Taft-Hartley Act, Memorandum 74-49, August 20, 1974; 86 L.R.R.M. 389 (1974), Labor Relations Yearbook-1974, at 343, 361.

The congressional legislative history also reveals that there was no intent to give retroactivity to the extension of jurisdiction over nonprofit hospitals. The following was said during floor debate:

> Mr. QUIE:
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> . . . . .
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> First, Mr. Speaker, for the purpose of clarifying the future application of this legislation, I would like to ask the gentleman from New Jersey these questions:
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> First, the bill provides that it will be effective 30 days after the date of enactment, but it does not provide effective future direction to parties who will now be covered under Federal law who were formerly covered by State law, or no law at all. It seems clear that regarding unfair labor practices, under the NLRA, only those practices committed after the effective date of the amendment could be processed by the NLRB. But, suppose an unfair labor practice charge had been filed under State law, prior to

> the effective date of the Federal legislation, would the State be allowed to conclude its inquiry?
>
> Mr. THOMPSON of New Jersey. Actually, there is no provision in the Federal law to preclude the State from concluding its inquiry, since the alleged unfair conduct would have occurred prior to the Federal law taking effect. However, it would seem appropriate for the State to consider Federal procedure and precedent prior to issuing a remedy. 120 Cong. Rec. 22942 (July 11, 1974).

It should also be noted that the National Board, as well as the federal courts, have reiterated the rule that the National Board cannot exercise its jurisdiction over labor disputes in nonprofit hospitals whose facts arose before the 1974 amendment took effect. *Puerto Rico Labor Relations Board and Sociedad Espanola de Auxilio Mutuo*, 217 N.L.R.B. No. 168, 89 L.R.R.M. 1164 (1975); *Vancouver Memorial Hospital*, 219 N.L.R.B. No. 15, 89 L.R.R.M. 1592 (1975). See also *Methodist Hospital of Ky. Inc.* v. *N.L.R.B.*, 619 F.2d 563, 568-571 (6th Cir. 1980); *Woodlawn Hospital* v. *N.L.R.B.*, 596 F.2d 1330, 1337 (7th Cir. 1979); *N.L.R.B.* v. *St. Luke's Hospital Center*, 551 F.2d 476, 483 (2d Cir. 1976); *Pa. Ass'n of Int. & Res.* v. *Albert Einstein Med. Ctr.*, 369 A.2d 711, 713 (Pa. 1976). *Cf. Mile Square Health Center*, 223 N.L.R.B. No. 201, 92 L.R.R.M. 1095 (1976); *Beverly Farm Foundation*, 225 N.L.R.B. No. 70, 92 L.R.R.M. 1425 (1976).

In *Sociedad Espanola de Auxilio Mutuo, supra*, the National Board expressly decided that its jurisdiction was limited to post-enactment labor disputes in nonprofit hospitals. Insofar as pertinent, it held:

> However, our assertion of jurisdiction is limited to disputes arising on or subsequent to August 25, 1974, and, accordingly, would not extend to any disputes arising before that date.

Our examination of the cases cited and of the legislative intent ensuing from the legislative history, convince us that the 1974 amendment to the federal statute extending its coverage to nonprofit hospitals, does not have a retroactive effect.

In the case at bar, the unfair labor practice charges against Hospital de la Concepcion were filed on March 9, 1974, with regard to events that took place before the federal act was amended to extend the National Board's jurisdiction to nonprofit hospitals. Hence, the Puerto Rico Labor Relations Board had jurisdiction over these institutions, and validly exercised it when it issued its Decision and Order against Hospital de la Concepcion. The fact that the grievance, and the Decision and Order were issued after the effectiveness of the federal act does not alter our conclusion because what determines petitioner's exercise of its jurisdiction is the date of the facts that gave rise to the unfair labor practice charges.

In this case there is no public policy conflict. Neither is there a conflict with a federal provision that could invalidate the Board's action. In fact, the Board's action of reinstating the dismissed employees and reimbursing their back pay is absolutely in harmony with the federal statutory scheme. *N.L.R.B.* v. *St. Luke's Hospital Center, supra.*

Respondent argues that when, on July 26, 1974, the amendment extending National Board jurisdiction to nonprofit hospitals was approved, there was a preemption of the state laws governing the matter, which had the effect of rendering state laws inapplicable and of stripping state courts and agencies of their jurisdiction. Respondent contends further that the differences between the federal and the state acts are so fundamental as to bar the National Board from surrendering its jurisdiction over nonprofit hospitals, to the State Board. We need not examine this argument because petitioner's jurisdiction over such institutions is not based on its surrender of jurisdiction but on the fact that the federal act's effectiveness is not retroactive. Hence, this is not a case involving a surrender of jurisdiction, but lack of jurisdiction by the National Board.

DEFENSE OF RES JUDICATA

The Hospital contends that the Board erred in dismissing its defense of res judicata raised with regard to case No. CS-73-4473, which we mentioned above. A brief examination of the

record and of the pertinent labor law provisions convince us that the issue is not valid.

As an essential requirement for the application of the res judicata defense, the court must have acted with jurisdiction. *Tartak* v. *District Court; Cruz, Int.*, 74 P.R.R. 805, 813 (1953); *Munoz* v. *Pardo*, 68 P.R.R. 569, 571 (1948). There is no such requirement here. The record of case No. CS-73-4473, shows that the Superior Court, precisely at the Hospital's request, declared itself without jurisdiction. The Hospital moved that forum to dismiss the complaint, grounded on the prohibition established in Act No. 50 of August 4, 1947, 29 L.P.R.A. § 101, which provides that the trial court does not have jurisdiction to issue preliminary or permanent injunction orders.[2] The Hospital also claimed the Labor Relations Board's exclusive power to investigate unfair labor practices, which authority is conferred by art. 7 of the Labor Relations Act, 29 L.P.R.A. § 68. However, the Hospital now maintains the opposite position and argues that the Superior Court had jurisdiction over one of the causes in that suit—the claim for $1,000,000 in damages—due to the private character of the action pursuant to our decision in *Asociacion de Guardianes* v. *Bull Line*, 78 P.R.R. 680 (1955). Its position is based on the argument that this cause of action dealt with the dismissed employees' back pay, and that it was dismissed for inactivity under Rule 11 of the Rules of Administration of the Courts of First Instance, which, in its opinion, constitutes res judicata. We do not agree.

The argument forgets that the obligation to reimburse back pay is an integral part of the Board's exclusive authority to carry out the public policy adopted in the Labor Relations Act, *supra*, art. 9 (29 L.P.R.A. § 70(1)(b)). By express statutory

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[2] Said act provides, insofar as pertinent:

> "No court of Puerto Rico shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict accordance with the provisions of this chapter."

provision, art. 7 (29 L.P.R.A. § 68(a)), this exclusive authority of the Board to prevent unfair labor practices shall not be affected by any other means of adjustment or prevention. See *F.S.E.* v. *J.R.T.*, 111 D.P.R. 505, 512-513 (1981).

In the federal sphere, the Wagner Act also recognizes the National Board's authority to order reinstatement of employees whether or not back pay is reimbursed. 29 U.S.C.A. § 160(c). Under this provision it has been decided that both the reinstatement and the back pay orders correspond to the National Board's exclusive jurisdiction, and not to the courts. *N.L.R.B.* v. *Armstrong Tire & Rubber Co., Tire Test Fl. Br.*, 263 F.2d 680 (5th Cir. 1959), etc.

The Superior Court's want of jurisdiction to entertain in case No. CS-73-4473, bars the Board from applying the defense of res judicata.

DEFENSE OF EQUITABLE ESTOPPEL

The assignment of error regarding the dismissal of the defense of equitable estoppel does not have merit either. The Hospital argues that the trial examiner's action, dissuading the Federation from filing unfair labor practice charges when the said Federation appeared for the first time before the Board, constitutes a waiver of his exclusive jurisdiction.

It suffices to say that the Board refused to apply said defense because the Hospital brought no evidence to support it. The very Decision and Order of the Board shows that the Hospital never summoned the trial examiner to testify on this particular.

Furthermore, the equitable estoppel defense usually does not lie when public policy execution is involved. In *Infante* v. *Board of Medical Examiners*, 84 P.R.R. 296, 304 (1961), we held with regard to this point, that said defense cannot be applied to the relationship between citizen and State, when a question of public interest, such as in the case at bar, exists.

Finally, the Hospital assigns that the Board erred in finding, as a question of fact, that the employees were dismissed because of their union activities, and, thus, in violation of the labor laws.

It appears from the record that the grievance charged the Hospital with the unlawful dismissal of 31 nurses, but evidence was only brought as to eight employees. The Board concluded that only five of them had been unlawfully dismissed for their union activities.

The Labor Relations Act expressly limits this Court's reviewing function in proceedings seeking enforcement of the Board's decisions and orders, in the following terms:

> The findings of the Board as to the facts, if supported by evidence, shall be conclusive. 29 L.P.R.A. § 70(2)(a).

We have examined the record and the transcript of the evidence brought before the Board, and we are convinced that there is substantial evidence to support the fact that the dismissal of the five employees was due to their union activities.

The assignment dealing with the finding that the Hospital refused to bargain in good faith is not important. This is so because the Board abstained from ordering an affirmative action to remedy the unfair labor practice of refusing to bargain. It deemed correct to abstain itself from taking affirmative action in view of the fact that the federal act had been amended on August 25, 1974, to confer jurisdiction to the National Board over nonprofit hospitals.

Judgment will be rendered to enforce the order of the Labor Relations Board issued on November 28, 1978.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-79-470

PUERTO RICO LABOR RELATIONS BOARD,
Petitioner,

v.

HOSPITAL DE LA CONCEPCION,
Respondent.

Review

JUDGMENT

San Juan, Puerto Rico, June 14, 1983

In view of the foregoing opinion, judgment is rendered to enforce the order of the Labor Relations Board issued on November 28, 1978.

It was so decreed and ordered by the Court and certified by the Clerk.

LADY ALFONSO DE CUMPIANO
Chief Clerk

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

No. 0-79-470

LABOR RELATIONS BOARD OF PUERTO RICO
Petitioner,

v.

HOSPITAL DE LA CONCEPCION,
Respondent.

Review

Division composed of MR. CHIEF JUSTICE TRIAS MONGE, MR. JUSTICE DAVILA, and MR. JUSTICE REBOLLO LOPEZ.

(Translation)

RESOLUTION

San Juan, Puerto Rico, July 15, 1983

The motion for reconsideration is hereby denied.

It was so agreed by the Court and certified by the Acting Clerk.

HERIBERTO PEREZ
Acting Clerk

IN THE SUPREME COURT OF PUERTO RICO

No. 0-79-470

LABOR RELATIONS BOARD,

Petitioner,

v.

HOSPITAL DE LA CONCEPCION,

Respondent.

Review

Division composed of MR. CHIEF JUSTICE TRIAS MONGE, MR. JUSTICE DAVILA, and MR. JUSTICE REBOLLO LOPEZ.

(Translation)

RESOLUTION

San Juan, Puerto Rico, August 11, 1983

The motion for reconsideration is hereby denied.

It was so agreed by the Court and certified by the Acting Clerk.

HERIBERTO PEREZ RUIZ
Acting Clerk

APPENDIX C

COMMONWEALTH OF PUERTO RICO
PUERTO RICO LABOR RELATIONS BOARD
SAN JUAN, PUERTO RICO

Case No. CA-5054
D-781

In The Case Of:
HOSPITAL DE LA CONCEPCION,

and

FEDERACION DE ENFERMERIA PRACTICA
LINCENCIADA DE PUERTO RICO, INC.

Before: ATTY. JUAN ANTONIO NAVARRO
Trial Examiner

Appearances:

ATTY. FEDERICO RODRIGUEZ PAGAN
MR. ELISEO BORRERO
MR. CESAR L. RIBOT
For the Employer

MRS. PURA MIRANDA DE TORRES
MR. HECTOR N. ORTIZ
For the Union

ATTY. RICHARD V. PEREIRA
For the Board

DECISION AND ORDER[*,**]

By virtue of a charge filed on January 9, 1974 by the Federacion Enfermeria Practica Licenciada de Puerto Rico, hereinaf-

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[*] Footnotes have been omitted.

[**] Indicates official translation.

ter the grievant, on March 3, 1975 the Puerto Rico Labor Relations Board, hereinafter the Board, issued a grievance against Hospital de la Concepcion, hereinafter the defendant.

The charge and the grievance accuse defendant of having committed unfair labor practices within the meaning of art. 8, sec. (1), items (a), (c), and (d) of the Puerto Rico Labor Relations Act of May 8, 1945, as amended (29 L.P.R.A. § 61 *et seq.*), hereinafter referred to as the Act. Copies of the charge, the grievance, and the notice of hearing were duly served on defendant.

On March 20, 1975, defendant answered the grievance. The first two public hearings of this case, set for April 17 and May 27, 1975, were continued at the defendant's request. On May 9, 1975, the defendant submitted an Amendment by Addition to the Answer to the Grievance.

A hearing was set for the third time for November 13, 1975, which hearing was continued at the request of the Board's Legal Division.

The hearing was held on December 9, 1975, at the Municipal Assembly Room at San German City Hall, before Atty. Juan Antonio Navarro, who was the Trial Examiner appointed by the Chairman of the Board.

After several continuances, the hearing was closed on May 25, 1976. On July 16, 1976, defendant filed a Bill of Exceptions to the Report of the Trial Examiner. The Board's Legal Division did not submit any report.

On January 5, 1977, defendant filed a "Motion Seeking Dismissal of the Grievance or Amendment by Addition to the Answer to the Grievance." Through a Resolution of January 10, 1977, the Chairman of the Board transferred said motion to the Trial Examiner who reopened the hearing on January 28, 1977, so as to receive evidence with regard to the judgment rendered by Honorable Superior Court Judge Waldo Santiago, Mayaguez Part, in case CS-73-4473, wherein the grievant sought an injunction against the defendant, against the Na-

tional Labor Relations Board, and against the Puerto Rico Labor Relations Board.

On August 26, 1976, The Trial Examiner rendered his Report, wherein he concluded that defendant committed an unfair labor practice within the meaning of art. 8, sec. 1, items (d) and (e) of the Act.

The Board has reviewed the resolutions issued by the Trial Examiner throughout the hearings, and, since it seems that no error prejudicial to the parties was committed, it affirms said resolutions.

After examining the Report of the Trial Examiner, the exceptions filed and all the documents that constitute the entire record of the case, the Board adopts said Report, modifying it in part, and draws the following,

FINDINGS OF FACT

I. The Defendant:**

Hospital de la Concepcion, Inc., is a nonprofit corporation that operates a hospital located at San German, Puerto Rico, engaged in the rendering of medico-hospital services, and which uses the services of employees for its operation.

II. The Grievant:**

The Federacion de Enfermeria Practica Licenciada de Puerto Rico is an organization that represents employees for collective bargaining and contracting purposes.

III. The Certification Of The Grievant

At the beginning of 1973, the defendant and the grievant subscribed an agreement for a consent election which was approved by the Regional Director of the 24th Region of the National Labor Relations Board. On February 8, an election by secret ballot was held among the licensed practical nurses and nurses with temporary licenses working at the defendant's hospital for the purpose of determining if they wished to be

represented for the purpose of collective bargaining. As a result of said election, on March 9, the Regional Director of the National Board certified petitioner as the exclusive bargaining agent of all the employees in the following appropriate bargaining unit:

> "All licensed practical nurses and nurses with temporary licenses employed by the Employer at its Hospital La Concepcion, San German, P.R. Excluded: All registered nurses, officer clerical employees, all other personnel, guards and supervisors as defined in the Act."
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On August 2, defendant filed a motion with the National Labor Relations Board requesting the revocation of the certification awarded to the grievant. Essentially, it was alleged in said motion that it operated a non-profit hospital; that on the date that it submitted to the Regional Director the information about its business operations it was not aware of the exclusion of the non-profit hospitals from the definition of "employer" in Section 2, Subsection (2) of the National Labor Relations Act; that due to that inadvertence it did not call to the attention of the federal officials about its status as a non-profit hospital. Defendant attached to said motion a copy of its Articles of Incorporation, certified by the Department of State of Puerto Rico. On August 9, the Regional Director of the National Labor Relations Board issued an order, granting the union, up to August 20, to show cause why the said motion should not be granted. The grievant did not appear. On August 23, the Regional Director, Mr. Raymond compton, revoked the certification granted to grievant on March 9. The order rested on the fact that because it operated a non-profit hospital, the

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*** Indicates paragraphs omitted.

National Board lacked jurisdiction inasmuch as defendant was not an employer as that term is defined in the National Act.

On October 3 the licensed practical nurses of the hospital began to strike because of the discharge of Nancy Vega and for other reasons hereinafter mentioned. On October 23 the nurses decided to file unfair labor practice charges in this Board. To that effect the strikers went before Enrique Lespier, a Board Examiner. He refused to process the charges and told them that it was no purpose in going ahead with the matter. He advised them to go ahead with the strike since that was the best form of pressure. Afterwards the employees decided to file a suit in the Mayaguez Branch of the Superior Court of Puerto Rico.

* * *

The grievant asked that the decertification order issued on August 23, by the codefendant the Regional Director of the National Board be set aside; that the codefendant the Puerto Rico Labor Relations Board be compelled to receive and investigate the unfair labor practice charge to be filed against the defendant; that an order issue requiring defendant to recognize grievant as the exclusive representative of the licensed practical nurses and the nurses with provisional licenses and to bargain in good faith the terms and conditions of employment; that a hearing be held to determine the amount of the damages claimed; that it be awarded a reasonable amount for litigation expenses and attorney's fees; that defendant be ordered to pay the grievant $1,000,000.00 in damages; that an order issue against defendant and its Medical Director, ordering to show cause why an injunction should not be issue ordering to bargain collectively.

On December 7, the Honorable Superior Judge Miguel A. Montalvo issued a resolution determining that the Puerto Rico Labor Relations Board did not have jurisdiction to enforce a certification issued by the Federal Board of Labor Relations; that the Court of First Instance of Puerto Rico did not have jurisdiction to enforce a certification issued by the National

Board; that the grievant had chosen the Federal laws (in reference to the National Labor Relations Act and the National Labor Relations Board) to achieve its purpose of obtaining a certification; that to invoke the protection of the Puerto Rico Labor Relations Act (in reference also to the Puerto Rico Labor Relations Board) it had to begin again all the proceedings, which the grievant had not done. The Court held that controversy raised by the grievant in case 73-4473 dealt with a classic labor dispute since a "labor organization" (grievant herein) sought to compel an "employer" (defendant herein) to recognize it as the bargaining agent of its employees and to bargain collectively. In conclusion, it held that Law No. 50, of August 4, 1947, forbade the issuing of an injunction in "labor management disputes". The grievant was ordered to pay costs, expenses and attorney's fees.

On August 20, 1976, a Judge of the Mayaguez Branch of The Superior Court of Puerto Rico, the Honorable Waldo Santiago, issued a judgment in civil case CS-73-4473 by which he decreed the dismissal of the cause pursuant to Rule 11 of the Rules for the Administration of the Court of First Instance of Puerto Rico. As a result of said judgment the complaint of the grievant and the counterclaim of the defendant were dismissed.

IV. The Year 1975**

On June 13, 1975, the Regional Director of the National Board issued a "Certification of Results of Election" in case No. 24-RC-5611, Hospital de la Concepcion and Conferacion Laborista de Puerto Rico, whereby it certified that the defendant's employees had not chosen any labor organization to represent them for collective bargaining purposes.

V. The Snack

The nurses working the 11:00 p.m. to 7:00 a.m. shift were entitled to a snack as a condition of their employment. That was eliminated between March and October.

VI. The Special Services

Prior to March, defendant's male nurses performed special duties if it was so required by patients. Those services were rendered by the nurses directly to the patient, in such a way that defendant did not deal directly with it. At the same time the male nurses would continue doing their regular work. By the time the employees began to organize, defendant forbade those special services.

VII. The Living Quarters

By the time of the organizational drive defendant asked some of its male nurses to relinguish the bedrooms that they occupied, which belonged to the defendant. Specifically, on July 24 it asked Milton Alvarado, Nelson Lopez, Hector Ortiz, and Harry Ruiz to clean out of the dormitories on or before August 15.

VIII. The Stoppage

On October 3 the licensed practical nurses of defendant went on strike. The action was motivated by the conduct of the defendant following the elections, the refusal of defendant to recognize the union as their exclusive bargaining agent and the desire of the employees to improve their conditions of employment. However, the immediate cause of the strike was the discharge of Nancy Vega. Almost immediately after the beginning of the protest, defendant transferred three Sisters of Charity and two graduates nurses to its operating room. That was necessary since almost all the personnel of the operating room were taking part in the strike. On the second day, defendant ordered the transmission of a message, through a local radio station, in which the strikers were invited to return to work. Some of the employees returned. Mrs. Julia Almodovar returned to work on the second day of the strike but Mr. Ribot, defendant's personnel manager, told her that her position had been covered with another employee. That was also the case of Mrs. Carmen Virginia Flores. Mrs. Carmen I. Sanabria went to the hospital about two weeks after the commencement of the

strike. Mr. Borrero, the Hospital administrator asked her to resign, which she refused.

A few days after October 3, respondent decided to substitute the strikers with other personnel. Except for the four employees aforementioned, defendant did not discharge the strikers, limiting itself to substituting them. The strike ended on or about December.

IX.—***

X.—***

XI.—***

XII.—***

XIII.—***

XIV.—***

XV.—***

XVI.—***

ANALYSIS

I. Jurisdiction Of The Labor Relations Board**

Defendant argued that the Board lacks jurisdiction to adjudicate this case because, due to the fact that an amendment to the National Labor Relations Act, approved on July 26, 1974, became effective on August 25, 1974, the doctrine of preemption of the field applies in this case. The amendment included nonprofit medico-hospital institutions under the provisions of the federal legislation.

The facts in controversy herein took place during 1973. Before August 25, 1974, nonprofit hospitals were expressly excluded from the Federal Labor Relations Act. The Amendment did not have a retroactive effect, hence, the National Board could not assume jurisdiction. Moreover, it could not assume jurisdiction because the unfair labor practices committed before July 26, 1974, did not constitute violations to the National Act.

The approval of the amendment triggered off situations during the period of transition which would be governed by the guidelines issued by the General Counsel in his Memorandum of August 20, 1974; ". . . Will have to be individually invaluated to ascertain the specific facts, the stage of any ongoing state proceedings and the possible prospective effect of continuation of the state proceedings."

Federal courts have consistently affirmed the jurisdiction of state bodies to adjudicate controversies regarding facts which occurred before August 25, 1974.

The case *Puerto Rico Labor Relations Board* v. *Sociedad Espanola de Auxilio Mutuo y Beneficiencia*, 89 L.R.R.M. 1164 (1975), dealt with controversies similar to those at bar. The Puerto Rico Labor Relations Board sought an opinion from the National Board ". . . on whether it would assert jurisdiction over the parties on these particular controversies." The National Board stated:

> . . . we conclude that the Board would assert jurisdiction herein. We leave to subsequent adjudication the determination of the precise monetary standard to be applied to nonprofit hospitals. However, our assertion of jurisdiction is limited to disputes arising on or subsequent to August 25, 1974, and, accordingly, would not extend to any disputes arising before that date.
>
> Accordingly, the parties are advised, under Section 102.103 of the Board's Rules and Regulations and Statements of Procedures, Series 8, as amended, that on the allegations herein presented the Board would assert jurisdiction over the operations of the Employer with respect to labor disputes cognizable under Sections 8, 9, and 10 of the Act, which occurred on or subsequent to August 25, 1974, the effective dae of Public Law 93-360.

In *Asociacion de Empleados de la Bayamon Transit* v. *Labor Relations Board*, 70 P.R.R. 273 (1949), the National Labor Relations Act (the Taft-Hartley Act) came into effect while an employer's petition to review a Board's order was pending before the Supreme Court. The Supreme Court decided that the State Board had jurisdiction only when (1) the employer commits an unfair labor practice or any conduct not enumerated in the National Act but included in the local one; 92) the employer's business is exempt from the National Act but is subject to the State Act; (3) the National Board surrenders its jurisdiction to the State Board pursuant to the conditions set in sec. 10(a) of the Taft-Hartley Act. The Supreme Court held that this case did not fall within any of the abovementioned categories, and then set aside the Board's Decision and Order for lack of jurisdiction.

This notwithstanding, there is a National Board opinion rendered in *Sociedad Espanola de Auxilio Mutuo y Beneficencia* where said body expressly surrenders its jurisdiction to the State Board in all those controversies arising before August 25, 1974, date when the amendment to the National Act took effect. Based on that opinion, and taking into account that the facts in the present controversy took place in 1973, this Board had jurisdiction over them, and, hence, the local law is applicable.

Items II - IX are omitted.

CONCLUSIONS OF LAW

I. The Employer:**

Hospital de la Concepcion, Inc., is an "employer" within the definition of the term given in art. 2(2) of the Act.

II. Labor Organization:**

Federacion de Enfermeria Practica Licenciada de Puerto Rico, Inc., is a "labor organization," within the meaning of the phrase in art. 2(10) of the Act.

III. The Unfair Labor Practice:**

a) On August 1, 1973, Hospital de la Concepcion, Inc., committed an unfair labor practice within the meaning of art. 8(1) d) of the Act, upon failing to bargain with grievant, which was the exclusive representative of the practical registered nurses for collective bargaining purposes.

b) Hospital de la Concepcion, Inc., incurred "dismissal by discrimination," according to the definition of the phrase in art. 8(1)(c) of the Act, when it dismissed five of its employees a while after they participated in a strike, or because it believed that they had participated in said activity.

c) Hospital de la Concepcion, Inc., committed an unfair labor practice, as defined in art. 8(1)(c) of the Act, when it changed the working conditions of Carmen I. Sanabria, Gladys Rodriguez Ramos, and Hector Ortiz, because of their union activities.

d) Hospital de la Concepcion, Inc., did not dismiss Gladys Rodriguez Ramos, Edwin Garcia, and Hector Ortiz.

Considering the fact that since August 25, 1974, the National Labor Relations Board assumed jurisdiction over nonprofit hospitals that comply with the jurisdictional rules of said Board, we deem that a conflict between the National and the local jurisdictions could ensue if we ordered defendant an affirmative action to remedy the unfair practice of refusing to

bargain. Hence, we do not order affirmative action on this particular.

Considering the above conclusions of fact and of law, the documentary evidence and the complete record of this case, and in conformance with art. 9(1)(b) of the Act, 29 L.P.R.A. 70(1)(b), the Board issues the following

ORDER**

Defendant Hospital de la Concepcion, its agents, successors in interest, and assignees, shall:

1) Cease and Desist from:

a) Dismissing the employees and/or changing their working conditions because they participate or have participated in a union and/or concerted activity.

b) Interfereing with, restraining or exercising coercion upon its employees in the exercise of the rights guaranteed by the Act.

2) Take the following affirmative action which will effectuate the purposes of the Act:

a) To restore to the old position or to offer a similar one to the following employees: Julia Almodovar Vega, Carmen Virginia Flores, Carmen I. Sanabria, Aida Maldonado, and Graciela Rivera.

b) To reimburse back pay from the date of their dismissal up to the date when they are reinstated, deducting whatever amounts are proper at law.

c) To fix and to maintain fixed, for a period of no less than (30) thirty consecutive days, in a visible place of his business, copies of the "Notice to All Our Employees" that is atttached hereto as part of this Decision and Order.

d) To notify the Chairman of the Board, within the ten (10) days after the date of this Order, the steps taken in compliance with these presents.

In San Juan, Puerto Rico, November 28, 1978.

/s/ LUIS P. NEVARES ZAVALA
Chairman

/s/ SAMUEL E. DE LA ROSA VALENCIA
Associate Member

/s/ FRANCISCO IRLANDA PEREZ
Associate Member

Attorney Francisco Irlanda Perez concurs with the Decision, although he dissents as to the refusal to bargain.

PUERTO RICO LABOR RELATIONS BOARD

APPENDIX D

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed documents are photocopies of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the following documents which are part of record 0-79-470, *Puerto Rico Labor Relations Board* v. *Hospital de la Concepcion*, the originals of which, in Spanish, are under my custody in this Office:

1. Fragments of the Decision and Order of the Labor Relations Board dated November 28, 1978.
2. Opinion of this Court dated June 14, 1983.
3. Resolution of this Court dated July 15, 1983.
4. Resolution of this Court dated August 11, 1983.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 16th day of September 1983.,

/s/ LADY ALFONSO DE CUMPIANO
Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico